

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS EUGENE MOORE,

Petitioner,

No. CIV S-02-0007 JAM DAD P

vs.

A.A. LAMARQUE, et al.,

ORDER

Respondents.

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Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On March 30, 2004, this action was stayed and the case was administratively closed while petitioner exhausted his state court remedies. On March 17, 2008, the stay was lifted and the case was re-opened. Before the court are petitioner's motion for a temporary restraining order/preliminary injunction, motions for extension of time to file a fifth amended petition, and motions for the appointment of counsel.

In his motion for injunctive relief, filed while the action was still stayed, petitioner seeks leave of court to file a fifth amended petition and exhibits so that his documents will not be lost, stolen or destroyed when he is transferred to Pelican Bay State Prison. Petitioner contends that two years ago, his legal documents (including transcripts and his attorney's work product) were stolen by prison officials. (Mot. at 1.) In anticipation of his transfer, "petitioner seeks an

1 injunction for the protection, preservation, and safeguard, of the petitioner's fifth amended  
2 petition for writ of habeas corpus and exhibits from potential theft, lost [sic], and/or destruction."  
3 (Id. at 2.) Along with this motion petitioner submitted a proposed fifth amended petition  
4 consisting of 206 pages with 195 pages of exhibits.<sup>1</sup>

5 Although petitioner has titled his request as a motion for injunctive relief, the  
6 court construes his motion as a request for leave of court to file a fifth amended petition while the  
7 action is stayed. Since the proposed fifth amended petition and exhibits have already been filed  
8 and the stay was subsequently lifted, the court will grant the motion nunc pro tunc. Petitioner's  
9 fifth amended petition and exhibits will be deemed petitioner's operative petition.

10 After the stay was lifted, petitioner filed two motions for an extension of time to  
11 file a fifth amended petition. It appears that petitioner is merely attempting to re-file his fifth  
12 amended petition that is already pending before the court. In light of the above, the motions will  
13 be denied as moot.

14 Since petitioner may be entitled to relief if the claimed violation of constitutional  
15 rights is proved, respondents will be directed to file a response to petitioner's fifth amended  
16 habeas petition.

17 Finally, the court has previously denied petitioner's motions for the appointment  
18 of counsel. In the present case, the court does not find that the interests of justice would be  
19 served by the appointment of counsel at the present time. Therefore, petitioner's motions will be  
20 denied.

21 Accordingly, IT IS HEREBY ORDERED that:

22 1. Petitioner's December 6, 2007 motion for a temporary restraining order and  
23 preliminary injunction, construed as a request for leave of court to file a fifth amended petition  
24 and so construed, is granted nunc pro tunc;

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26 <sup>1</sup> Court documents numbered 70 and 73.

1           2. The court deems petitioner's December 6, 2007 fifth amended petition for a  
2 writ of habeas corpus and petitioner's exhibits (documents # 70 and 73), as the operative  
3 pleading in this action;

4           3. Petitioner's December 12, 2007 and December 28, 2007 motions for the  
5 appointment of counsel are denied without prejudice;

6           4. Petitioner's April 14, 2008 motions for an extension of time to file a fifth  
7 amended petition for writ of habeas corpus (documents #77 and 78), are denied as moot;

8           5. Respondents are directed to file a response to petitioner's fifth amended habeas  
9 petition within sixty days from the date of this order. See Rule 4, Fed. R. Governing § 2254  
10 Cases. An answer shall be accompanied by all transcripts and other documents relevant to the  
11 issues presented in the petition. See Rule 5, Fed. R. Governing § 2254 Cases;

12           6. If the response to the fifth amended habeas petition is an answer, petitioner's  
13 reply, if any, shall be filed and served within thirty days after service of the answer;

14           7. If the response to the fifth amended habeas petition is a motion, petitioner's  
15 opposition or statement of non-opposition to the motion shall be filed and served within thirty  
16 days after service of the motion, and respondents' reply, if any, shall be filed and served within  
17 fifteen days thereafter; and

18           8. The Clerk of the Court shall serve a copy of this order together with a copy of  
19 the fifth amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on Michael  
20 Patrick Farrell, Senior Assistant Attorney General.

21 DATED: May 9, 2008.

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24 \_\_\_\_\_  
DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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